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SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-385

TATE EDUCATIONAL FOUNDATION, INC.,
Petitioner,

vs.

KELLY McNEAL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE NOT PRINTED

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

TATE EDUCATIONAL FOUNDATION, INC.,
Petitioner,

vs.

KELLY McNEAL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, TATE EDUCATIONAL FOUNDATION, INC., a corporation organized under the laws of Mississippi, prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 7, 1972, whereby the district court was directed to enjoin petitioner or its members, successors or assigns from using the property which is the subject of this action for the operation of a private school on a discriminatory basis, and to require, if such property is used for a private school, that such school shall be operated without any discrimination of any kind or character based upon race, creed, color or national origin, and that the doors of any such school shall be open at all times to all qualified applicants on an equal basis.

OPINIONS AND ORDERS BELOW

Neither the opinions nor orders of the District Court of the United States for the Northern District of Mississippi are reported. The opinion of Orma R. Smith, District Judge, dated August 19, 1970, which includes both findings of fact and conclusions of law, is included in the Appendix at pages A1-A12, and the orders of the District Court pursuant thereto, also dated August 19, 1970, are included in the Appendix at pages A12-A14. The order issued by the District Court pursuant to the order of the United States Court of Appeals for the Fifth Circuit dated June 7, 1972, is included in the Appendix at pages A30-A31.

Nor are the opinions and orders of the United States Court of Appeals for the Fifth Circuit reported. Its opinions dated September 17, 1971, including the dissenting opinion of Circuit Judge Gewin, are included in the Appendix at pages A15-A26, and its order pursuant thereto is included in the Appendix at pages A26-A27.

The opinion of the United States Court of Appeals for the Fifth Circuit dated June 7, 1972, in which the majority opinion handed down September 17, 1971, was modified, but which also includes the limitation imposed against the use of the property involved herein, which petitioner prays to be reviewed, is included in the Appendix at pages A28-A29.

The opinion of the United States Court of Appeals for the Fifth Circuit dated June 7, 1972, also included an order denying petitioner's petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under *Section 1254 (1)* of *Title 28, United States Code Annotated.*

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QUESTION PRESENTED FOR REVIEW

The question presented for review is:

Does not the restriction placed upon petitioner's use of the Thyatira School property by the Court of Appeals for the Fifth Circuit deprive petitioner of its property, without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

THE CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the pertinent part of the Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of . . . property, without due process of law; . . . ."

It also involves *Sections 6328-41, 6328-42,* and *6328-43* of *Mississippi Code of 1942 Annotated,* the texts of which are set forth in the appendix.

STATEMENT OF THE CASE

While this action, which was begun on April 27, 1970, was ostensibly brought to desegregate the schools of the Tate County (Mississippi) School District, in reality there was no dispute between the parties about the duties and responsibilities of the defendant Board of Education in operating the schools of the district. In their answer to the complaint, the Tate County Board of Education and the individual members thereof pointed out that while the schools of the district had been operated during the several preceding years under a "freedom-of-choice" plan, they recognized, in the light of what this court had said in *Green* v. *County School Board of New Kent County,*

Va., 391 U.S. 443, 20 L. Ed. 2d 727, that they should no longer operate the schools of the district under such a plan and then advised the court that they were then engaged, in conjunction with the Department of Health, Education and Welfare, in selecting that method, or combination of methods, for assigning students to particular schools, and for operating the schools of the district, which would satisfy the objectives set forth by respondents in their complaint, and that they recognized the validity of those objectives.

The district court, in view of the statements in the answer of defendant Board of Education, gave defendant Board of Education until July 10, 1970, to prepare and submit a workable plan for the operation of the schools of the district as a unitary school system.

Within the time allowed by the court, defendant Board of Education submitted its plan for the operation of the schools of the district, and pointed out (1) that it was a workable plan for the operation of the schools of the district as a unitary school system, (2) that it had been prepared by defendant Board of Education in conjunction with the Department of Health, Education and Welfare, and (3) that it had been approved by the Department of Health, Education and Welfare and accepted by defendant Board of Education.

After clarification of some minor features of the plan had been provided, the district court, after a pro forma hearing—respondents having entered no objection thereto—adopted said plan by its order of August 4, 1970.

It must be pointed out that in the plan for the operation of the schools of the district, worked out by defendant Board of Education with the Department of Health, Education and Welfare and adopted by the district court

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without objections from respondents, there was no provision for the operation of the school known as Thyatira School, or for the utilization of the property on which Thyatira School had been located.

The real issue between the parties—and the only true issue in the case—concerns the school district's sale of the Thyatira School property to Mr. Webber Steward, which had taken place on January 7, 1970, and Mr. Steward's subsequent sale of the property, on January 26, 1970, to petitioner, which put the property to use as a private school. Respondents contended that the sale of the property by the school district violated the Fourteenth Amendment to the Constitution of the United States.

The school district's sale of the property to Mr. Steward had been made pursuant to the provisions of *Section 6328-41* of the *Mississippi Code of 1942, Recompiled,* which authorized the sale of school property when it is no longer used for school or related school purposes and is not needed in the operation of the schools of the district. Probably every state in the Union has such a statute. The facts with respect to such sale, and to the justification therefor, which follow, are not in dispute.

Prior to the reorganization of the school district pursuant to the provisions of *Chapter 12, Laws of 1953* (*Chapter 5* of *Title 24* of *Mississippi Code of 1942, Recompiled, Sections 6328-01 et seq.),* the district operated a grade 1 to 12 school known as Thyatira School (R. 161, 165, 166), in a building which had been constructed in 1931 (R. 161). In the reorganization, the district was required to discontinue it as a grade 1 to 12 school and to make it an elementary school (R. 166). Thereafter, through the 1963-64 school year, it was operated as a grade 1 to 6 school (R. 161). During the following six years, but four grades

were offered at the school, and the enrollment was pitifully small (R. 161, 162):

1964-65	43
1965-66	51
1966-67	53
1967-68	47
1968-69	47
1969-70	35

The four grades were taught by two teachers, with one teaching the first and second grades and the other the third and fourth grades (R. 162, 163). Each teacher had her two classes in one classroom (R. 163). A third classroom was used as a makeshift cafeteria (R. 163). It was, of course, a very poor educational arrangement (R. 164).

The obvious conclusion that use of the Thyatira School should be discontinued was underlined when the district was advised by the State Department of Education, on July 28, 1969, that instructions from the Commissioner of Education of the U. S. Office of Education required that all school districts participating in Title I programs had to equalize per-pupil expenditures between target and non-target schools, and when, on August 13, 1969, the Department of Education forwarded to the Superintendent of the District a copy of ESEA Title I Program Guide #45A, which had been issued by the Office of Education, Department of Health, Education and Welfare, on July 31, 1969, which stipulated that applicants for Title I funds would have to give assurances that with respect to the use of state and local funds the ratios of (a) pupils to teachers, (b) pupils to other professionals and (c) pupils to non-professionals would be no higher for the Title I areas than for the non-Title I areas (R. 172, 173, 175, 176). Thyatira School, with its small enrollment, could not be continued under those guidelines.

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In addition to the foregoing reason for closing Thyatira School, there was the fundamental fact that the school was not needed for the education of the pupils of the district (R. 177).

The decision to close Thyatira School at the end of the current school year met with the approval of all who had anything to do with the operation of the schools of the district. The plan for the operation of the schools which was then being worked out with the Department of Health, Education and Welfare called for the discontinuance of Thyatira School, and the plan which was submitted to the district court, bearing the imprimatur of the Department of Health, Education and Welfare, called for the discontinuance of Thyatira School (R. 177). Respondents, who could have objected to the plan had they disagreed with the non-use of Thyatira School, interposed no objections to the plan. The district court, by its order of August 4, 1970, approved the plan.

Since Thyatira School would be discontinued at the end of its current school year and would not be needed in the operation of the schools of the district, defendant Board of Education, at its November 1969 meeting, adopted a resolution to that effect, which included a finding that the cost of maintaining Thyatira School was far above the average cost of the students in other attendance centers and that it would be more economical and feasible for the students to be transported and placed in larger attendance centers (R. 182).

On December 10, 1969, defendant Board of Education adopted a second resolution, in conformity with *Section 6328-42* of the *Mississippi Code of 1942, Recompiled,* wherein it declared that the Thyatira School property was not used nor needed for school purposes and directed that

it be advertised for sale upon competitive bids in the manner provided by statute (R. 183).

The property was then advertised for sale in the Tate County Democrat, a weekly newspaper having a general circulation in Tate County, for the three consecutive weeks called for by *Section 6328-43* of the *Mississippi Code of 1942, Recompiled* (R. 183).

At the time fixed in the advertisement, Mr. Webber Steward, through his attorney, submitted a sealed bid of $4,001.00 (R. 184).

The bid of Mr. Steward, being the highest and best bid for the property, was accepted, and the president and secretary of the Board were directed to convey the property to Mr. Steward, by a deed in the form required by *Section 6328-43* of the *Mississippi Code of 1942, Recompiled* (R. 184).

On January 7, 1970, the property was conveyed to Mr. Steward by a deed which conformed to the requirements of the statute.

On January 26, 1970, the property was conveyed by Mr. Steward to petitioner. Thereafter, after it was renovated, it was put to use as a private school.

At the time defendant Board of Education had under consideration a possible sale of the property, and during the time the property was under advertisement for sale, and at the time the property was sold to Mr. Steward, neither the members of defendant Board of Education nor its superintendent had any idea that the property might ultimately be used for a private school (R. 206, 207, 213, 138, 141). They had had no conversation with anyone about the establishment of a private school (R. 208, 209, 212, 42, 19).

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It was not until after the property was advertised for sale that Mr. Steward considered its possible purchase (R. 18). He had not discussed the sale with any member of defendant Board of Education or its superintendent (R. 18, 19), nor did he ever thereafter discuss it with them, or any of them (R. 19, 42). It was not until after the advertisement appeared in the newspaper that he and his group got together and raised the funds to bid for the property (R. 44, 45, 18, 20, 30, 31).

At the time of the purchase of the property, there was no such entity as the Tate County Educational Foundation, Inc. It was formed thereafter (R. 43, 52, 54), and then the property was conveyed to it by Mr. Steward.

Those facts were found by the trial court:

> "There was no pre-arrangement or prior understanding . . . with members of the School Board or its Superintendent that the . . . property would be declared surplus property, and its sale ordered."

It was not even contended otherwise. As the majority opinion of the Court of Appeals points out:

> "It is not contended that the school board lacked valid reasons for selling Thyatira School, or accepted an inadequate price for the property, or in any way affirmatively participated in the creation of an all-white private school."

The property was in deplorable condition (R. 95, 96, 99, 100, 170, 171, 172). Subsequently, and mostly prior to the bringing of the suit, it was renovated, partly with donated labor and material but also through the expenditure of some $20,000.00 in cash outlays. (See trial court's findings of facts.)

No black has yet applied for employment on the faculty of the school operated by petitioner, which has now completed its second year of operation, or for admission as a student.

Thyatira School has never had a racially discriminatory policy. To make that fact clearly evident to everyone, petitioner's Board of Directors formally adopted a non-discriminatory statement of policy and publicized it in the local newspaper. It provides that an applicant's race, color, religion or national origin will *not* be taken into account in the determination of whether he or she will be accepted or rejected as a student.

Petitioner's school, at the time of the trial, had but 134 pupils (R. 265), some of whom had come from districts other than the Tate County School District (R. 266). They represented but about 3% of the district's school population, which was approximately 4,000 pupils, and their departure had no effect on the district's schools.

The district court, in addition to holding that the property was not needed for the operation of the schools of the district, that there were valid reasons for the sale of the property, that there was no pre-arrangement for the sale of the property, and that the property was not sold for an inadequate price, noted "that this action does not involve a sale of school property by a school board, after an integration action had been filed, nor does it involve an action where a school board has abandoned and sold school property based primarily upon a finding that the integration of the schools of the district will result in reduced attendance to the extent that the property will not be needed in the operation of the schools," and accordingly, in its order of August 17, 1970, upheld the sale of the property.

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Respondents took an appeal from the judgment of the district court, which was heard by Judges Brown, Gewin, and Morgan of the Court of Appeals for the Fifth Circuit.

On September 17, 1971, two of the appellate Judges—Judges Brown and Morgan—reversed the judgment of the district court. They voided the sale of the property by the school district to Mr. Webber Steward, saying, "We will not allow a school board to circumvent our decision in *Wright* v. *City of Brighton, Alabama,* 441 F. 2d 447."

Judge Gewin dissented. He noted that "the flavor and implications of the opinion are totally contrary to all of the facts found by the trial court, as the opinion silently concedes," and characterized the majority's reliance on *Wright* v. *City of Brighton, Alabama,* supra, as "an unwarranted, illogical, unjust and unreasonable extrapolation of a case not cited by any party to this litigation." He concluded—and correctly we think—that:

> "The majority seems to conclude that the title to lands once used for schools may be forever tainted, and that somehow, there is raised by implication of law a covenant that will run with the land prohibiting its use for any type of private school endeavor."

Petitioner and defendant Board of Education thereupon separately petitioned for rehearing en banc. In their petitions, they pointed out that by equating their actions with those taken by the City of Brighton, as described in *Wright,* the majority opinion had done them a great injustice and had twisted the facts of the case beyond recognition.

How, they asked, in view of the fact that *Wright* was not decided until March 16, 1971, could they be charged

with attempting to circumvent the court's decision in *Wright* by the sale of the property on January 7, 1970?

How, they also asked, in view of the fact that, on the basis of undisputed testimony, the district court had found that the Board of Education had acted in good faith and lawfully in every respect, could it be said that "with slight variations the identical issue was before the court in Wright?" After all, *Wright* was an action to enjoin a proposed sale of an abandoned school building to a private all-white school, with a policy "to accept only white students." It was to be made at a time when there was before the City of Brighton a proposal that the building be used to house certain welfare programs, and after the City of Brighton had been advised by a federal court that its proposed *lease* of the building to the private school would probably fall within the proscriptions of *Burton* v. *Wilmington Parking Authority*, 365 US 715, 81 S Ct 856, 6 L Ed 2d 24, 45, and *Hampton* v. *City of Jacksonville*, 304 F. 2d 320.

At the time the sale in *Wright* was determined upon, the City of Brighton knew that the purchaser would operate in the building an all-white segregated school. "The city in effect encouraged the maintenance of a segregated facility by its action. It participated in a transaction by which a public building, once open to all on an equal basis, was converted into a segregated facility where the black people of the community were no longer welcome."

As to the sale in *Wright*, "it should be remembered that (it) was an afterthought, a substituted arrangement entered into only after the United States District Court informed the parties that a lease to the academy, a discriminatory institution, would violate the Fourteenth Amendment."

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In *Wright,* the use of the building for an all-white segregated private school, open only to those of the white race, was not the unintentional result of a fortuitous sale. "The city got just what it intended and planned to achieve."

And in addition, petitioner and defendant Board of Education pointed out in their petitions for rehearing that the majority opinion not only had the effect of overruling a rule of property established by the Court of Appeal for the Fifth Circuit in *Derrington* v. *Plummer,* 240 F. 2d 922, but that it also had the effect of depriving petitioner of its property, without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

After a delay of more than eight months, those on the panel who had invalidated the sale of the property by the school district to Mr. Steward reversed themselves and upheld the sale. But while so doing they placed a limitation upon the use of the property by petitioner which, in our opinion, amounts to an unconstitutional deprivation of the property rights of petitioner, without due process of law. The order whereby that was sought to be accomplished is to this effect:

> "We now vacate the order of the district court upholding the sale of Thyatira School, and remand the case to the district court with directions to enter an order upholding the sale of the school but enjoining the Tate County Foundation or its members, successors or assigns from using the property for the operation of a private school on a discriminatory basis. Such injunction of the district court shall provide that if the Thyatira School property is used for a private school, such school shall be operated without any discrimination of any kind or character based

upon race, creed, color or national origin, and the doors of any such school shall be open at all times to all qualified applicants on an equal basis.'"

REASONS FOR ALLOWANCE OF THE WRIT

When the Thyatira School Property was sold by the Tate County School District to Mr. Webber Steward on January 7, 1970, Mr. Steward, if the sale was a valid sale, became the owner of the property, clothed with the rights of ownership, including the right to sell it to whom he chose.

That the sale was a valid sale has been established by the order of the Court of Appeals for the Fifth Circuit directing the district court to enter an order upholding the sale. Its holding, reluctant though it was, could not have been otherwise. For the proof showed beyond dispute that there was no purpose of discrimination in the minds of the members of the Tate County Board of Education when it declared the property surplus, or when it ordered the property advertised for sale, or when it sold it to Mr. Steward. The evidence is all to the effect that there has been no joinder by the Tate County Board of Education, or by any of its members, or by its superintendent, in the operation of the private school. There was no reservation of control over the property. And neither the sale of the property, nor the operation of the private school, has had a detrimental effect on the operation of the public schools of the district.

Hence the sale of the property by Mr. Steward to petitioner not only placed the title to the property in petitioner, but by it petitioner became vested with the constitutionally protected right to use the property in the conduct of any lawful business. Any deprivement of that right without due process of law constitutes a violation of petitioner's

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rights under the Fifth Amendment to the Constitution of the United States.

Now the constitutionally protected right to use one's property in the conduct of a lawful business includes the right to use it in the operation of a private segregated school. There is nothing illegal or unlawful about the operation of a private segregated school. The Constitution erects no shield against merely private conduct, howsoever some people may view it as discriminatory or unlawful. No constitutional right—no privilege or immunity granted by the Constitution—is abridged by a private institution's discriminatory rules of admisson.

The Bill of Rights grant to the citizens of our free society of the right to freedom of association is also bound up with the right to use one's property in the operation of a private segregated school. The right of parents to choose the academic environment in which they wish their children to be educated is derived from their constitutional right of freedom of association. To deny the use of property for the operation of a private segregated school would necessarily destroy the right of parents who wish to have their children educated in an environment such as such a school provides, to have their children educated in such an environment, in violation of their constitutional right to freedom of association.

Consequently, when the two judges of the Court of Appeals for the Fifth Circuit directed the district court—without pretense of authority of law—to enjoin petitioners from using its property in the operation of a private segregated school, those judges, without due process of law, deprived petitioner of its constitutional right not to be deprived of his property, without due process of law.

The effect of the decision that petitioner should be enjoined from using its property in the operation of a private

segregated school was accurately summed up by Judge Gewin, when he declared:

> "The majority seems to conclude that the title to lands once used for schools may be forever tainted and that somehow, there is raised by implication of law a covenant that will run with the land prohibiting its use for any type of private school endeavor."

Such a decision decides an important question of federal law which has not been, but should be, settled by this court. It also represents such a departure from the accepted and usual court of judicial proceedings as to call for an exercise of this court's power of supervision.

PETITIONER BECAME THE OWNER OF THE PROPERTY ON JANUARY 26, 1970

Since there was no dispute about the fact (1) that the property which was the subject of the sale sought to be set aside was surplus and no longer needed for school purposes, (2) that defendant Board of Education was authorized by statute to sell the property, and (3) that the property was sold in accordance with the provisions of the statute, it necessarily follows that the sale of the property to petitioner's grantor enabled petitioner's grantor to convey a full and complete title to the property to petitioner unless there was something connected with the sale which prevented defendant Board of Education from passing such a title to petitioner's grantor.

The courts have enunciated those factors which would justify a court in setting aside a sale of public property by a public agency, viz.: a purpose of discrimination by the public agency, a joinder in the enterprise, or a reservation of control. Hence proof was taken to see if any one of those factors was present in the sale under discussion.

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That proof showed beyond peradventure that the sale was not made with a purpose of discrimination, that there was to be no joinder in the enterprise by anyone connected with the grantor or the state, and that there was no reservation of control over the property.

The general rule on this point is given in *15 Am. Jur. 2d, Civil Rights*, #9:

> "A state or subdivision thereof may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee will not be state action subject to the restraints of the Fourteenth Amendment. Likewise, where there is no purpose of discrimination, no joinder in the enterprise, or no reservation of control by the state, it may lease for private purposes property not used or needed for state purposes, and the lessee's conduct in operating the leasehold will not constitute state action."

The case on which the general rule is based is that of *Derrington* v. *Plummer*, 240 F. 2d 922, certiorari denied 358 U.S. 924, 1 L. Ed. 2d 719, 77 S. Ct. 680. In it, the Court of Appeals for the Fifth Circuit said:

> "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

In *Tonkins* v. *City of Greensboro, N.C.*, 276 F. 2d 890, the Court of Appeals for the Fourth Circuit held that un-

less the City of Greensboro, which had sold a municipal swimming pool to a corporation which continued to operate it on a segregated basis, "openly or secretly assists in the operation of this racially restricted pool by any form of subvention or other favorable treatment," the sale of the pool could not be set aside. Said the Court:

> "The question to be determined is whether apart from motives, the sale was real or only a pretense."

Then, after quoting the finding of the district court,

> " 'that the plaintiffs have failed to sustain the burden of showing that the sale was not bona fide, or that the City of Greensboro has any agreement of any kind with the Greensboro Pool Corporation relating to the future ownership, use or operation of the pool,' "

the court concluded:

> "We have therefore, a case of racial discrimination in respect to a pool privately owned, financed and operated without participation or assistance, direct or indirect, by the City of Greensboro. This does not constitute state action or conduct which a Federal Court may enjoin under the Fourteenth Amendment."

The proof in this case as to the matters mentioned in *Derrington* are not in dispute. There is no evidence to contradict the evidence that there was no purpose of discrimination in the minds of the members of the Tate County Board of Education when it declared the property surplus, or when it ordered the property advertised for sale, or when it sold it to Mr. Steward. The evidence is all to the effect that there has been no joinder by the Tate County Board of Education, or by any of its members, or by its superintendent, in the operation of the private school. And there was, of course, no reservation of control over the property.

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In addition, since the question of the effect of the establishment of petitioner's private school on the public schools of the district may occur to someone, we add the following from Judge Gewin's opinion:

> "... The record conclusively shows that at the time of trial only 134 pupils had sought enrollment in the Foundation school. A number of the students did not even come from the Tate County School District but came from other districts. The total number to be enrolled in the Foundation school (including those who came from outside the district) was only about 3% of the total enrollment of the entire district which serves approximately 4,000 students."

And we call attention to the answer given by a three-judge District Court in *Norwood* v. *Harrison*, 340 F. Supp. 1003, to the contention that the distribution of state-owned textbooks to children attending racially segregated private schools in Mississippi had the effect of undermining efforts toward unitary school systems:

> "The public schools which plaintiffs acknowledge were fully established as unitary schools throughout the state (of Mississippi) no later than 1970-71, continue to attract 90% of the state's educable children."

The inescapable conclusion is that the sale of the property to petitioner's grantor was a valid sale—as indeed the Court of Appeals for the Fifth Circuit finally decided when it directed a judgment upholding the sale—and petitioner became clothed with all the incidents of ownership when the property was conveyed to it on January 26, 1970, including the constitutionally protected right to use it in the conduct of any lawful business.

PROPERTY, IN THE CONSTITUTIONAL SENSE THAT NO ONE CAN BE DEPRIVED OF PROPERTY EXCEPT BY DUE PROCESS OF LAW, INCLUDES THE RIGHT TO USE ONE'S PROPERTY IN THE CONDUCT OF A LAWFUL BUSINESS

The right to use one's property in the conduct of a lawful business is property within the protection of the Fifth Amendment to the Constitution of the United States. It is constitutionally impermissible to deprive one of the use of his property in the conduct of a lawful business, without due process of law. This court has so held with respect to the business of operating a factory, *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349; the business of operating a restaurant, *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254; the business of operating a cotton gin, *Frost* v. *Corporation Commission*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483; the devotion of real property to any legitimate use, *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210.

"Property," said this court in *Buchanan* v. *Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149, "is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. . . . Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." See also *Terrance* v. *Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255; *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

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In *Shelley* v. *Kraemer*, supra, the rule was thus stated:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

Mr. Justice Black, although in dissent, in *Bell* v. *Maryland*, 378 U.S. 226, 84 S. Ct. 1814, 12 L. Ed. 2d 822, fairly summarized the existing case law relating to property rights as follows:

> "Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' Buchanan v. Warley, supra, 245 U.S. at 74, 62 L. Ed. at 161, L.R.A. 1918 C 1201."

A CITIZEN—IN THE ABSENCE OF A STATUTE—HAS THE RIGHT TO CONDUCT A SEGREGATED PRIVATE SCHOOL

No one can gainsay the fact that the operation of a private school is a lawful and legitimate enterprise. In fact, it has been recognized time and time again that those who establish and operate a private school are furthering and promoting the national interest in the education of its youth.

As this court expressed it in *Board of Education* v. *Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, 1068:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students."

Recognition of the legality and legitimacy of the business of operating a private school was implicit in this court's decision in *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, in which it nullified Oregon's compulsory public school attendance law and recognized the right of private elementary schools, both secular and sectarian, to exist in our society, and the right of the parents to send their child to the school of their choice. As this court stated, the state may require parents to send their children to *some* school. And it may prescribe minimum academic standards for *all* schools. But the state cannot compel attendance at public schools. It cannot "standardize its children by forcing them to accept instruction from public teachers only." The Court made uncommon common sense when it recognized that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the

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high duty, to recognize and prepare him for additional obligations." And it placed such right among those guaranteed to all citizens by the Constitution of the United States when it declared:

> ". . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."

The forerunner of *Pierce* was *Meyer* v. *Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, in which the Supreme Court nullified the conviction of Meyer, a teacher in a parochial school located in Nebraska who had taught German to a child who had not attained and passed the eighth grade, contrary to Nebraska statute. In declaring the statute unconstitutional, the court said:

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitu-

tion—a desirable end cannot be promoted by prohibited means."

Pierce was followed by *Farrington* v. *Tokushige*, 273 U.S. 289, 47 S. Ct. 406, 71 L. Ed. 646. The territory of Hawaii had enacted statutes requiring the payment of fees on the basis of the number of pupils attending schools taught in a foreign language and imposing other unreasonable and arbitrary restrictions upon such schools. In overthrowing these statutes the court held as follows:

> "The general doctrine touching rights guaranteed by the 14th Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625; Bartels v. Iowa, 262 U.S. 404, 67 L. Ed. 1047, 43 Sup. Ct. 628; Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 39 A.L.R. 468, 45 Sup. Ct. Rep. 571. While that Amendment declares that no state shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the 5th Amendment—'no person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the territory. Those fundamental rights of the individual which the cited cases declared were protected by the 14th Amendment from infringement by the states, are guaranteed by the 5th Amendment against action by the territorial legislature or officers."

In the concurring opinion of Mr. Justice Douglas in *Abington School District* v. *Schenapp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844, 861, it was said:

> "Attendance at the public schools has never been compulsory; parents remain morally and constitution-

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ally free to choose the academic environment in which they wish their children to be educated. . . . The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. . . . The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election."

The general rule on this proposition is thus expressed in *15 Am. Jur. 2d, Civil Rights, #49*:

"The owners of private educational institutions may, in the absence of statutes imposing a general public duty to admit as students any and all citizens, select those whom they will receive into the institution as students, and discriminate for any reason they see fit; their relation to their pupils is based upon contract and not on public rights. A Negro is denied no constitutional right by being excluded from such an institution."

In support of the text, the editors cite *Reed* v. *Hollywood Professional School*, 169 Cal. App. 2d Supp. 887, 338 P. 2d 633, in which it was said:

"It was early decided that a Negro was not denied any constitutional right by refusal of a private education institution to admit him, apparently on the ground that the constitutional guarantees apply to state action rather than to private action. State ex rel. Clark v. Maryland Institute for Promotion of Mechanic Arts, 1898, 87 Md. 643, 41 A. 126; Booker v. Grand Rapids Medical College, 1909, 156 Mich. 95,

120 N.W. 589, 24 L.R.A., N.S., 447; 10 Am. Jur. 910; Kirkpatrick v. Williams, 1949, 53 N. Mex. 477, 211 P. 2d 506, 507; see 55 Am. Jur. 11, sec. 15; 10 Am. Jur. 909-910.

. . .

"In our opinion private schools should be entitled to contract or refuse to contract with students of their choice for whatever reason if such contract or refusal does not fall within the constitutional or statutory proscription against discrimination on the basis of race or color. We do not find any authority that such refusal does so."

And *State ex rel. Clark* v. *Maryland Institute for Promotion of Mechanic Arts,* 87 Md. 643, 41 A. 126, in which the court said this about the refusal of a private school to enroll a youth of African descent as a pupil:

"The gravamen of the offense of the Maryland Institute is that it has exerted the ordinary right of the proprietor of a private school to admit only such pupils as are considered desirable. It has been said by the supreme court of the United States that the right to follow any of the common occupations of life is inalienable. Allgeyer v. Louisiana, 165 U.S. 589, 17 Sup. Ct. 427. And in the same case the court evidently shows that it regards the prevention of a citizen from doing what is proper, necessary and essential to the successful management of his business as a deprivation of his liberty, which cannot be done without due process of law. This is one of the wrongs which the fourteenth amendment was intended to prohibit. It would be a curiosity in jurisprudence if the exercise in the ordinary and accustomed way of rights which the fourteenth amendment is so solicitous to

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protect should be obnoxious to its condemnation. No one can plausibly maintain that the Maryland Institute has done any wrong to the appellant by simply attending to its own business in a quiet and unobtrusive manner. It has not deprived him of any privilege or immunity which he possessed; it has robbed him of no property; it has not excluded him from the benefit of any legal enactment made in his favor. It has merely let him alone. It would be difficult to prove that it had in this way acted in violation of the fourteenth amendment. We find, in fact, that the authorities all hold that the fourteenth amendment refers, as its terms import, exclusively to state action, and not to anything which might be done by private individuals."

Booker v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589, is another case involving a complaint stemming from the refusal of a private school to accept Negro applicants. In dismissing the complaint, the court said:

> "It seems clear that private institutions of learning, though incorporated, may select those whom it will receive, and may discriminate by sex, age, proficiency in learning, and otherwise. Probably no reason need be given for refusing in the first instance to admit any student. Relators have been denied no privilege or immunity resting in positive law protected or guaranteed by the federal or the state Constitution."

The essential facts are that (1) the portion of the judgment sought to be reviewed seeks to enjoin discrimination by a private citizen (2) in the absence of any law forbidding such discrimination. No court has the authority to so order.

The principle we invoke was succinctly stated in *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161:

> "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Moose Lodge No. 107 v. *Irvis*, ... U.S. ....., ... S. Ct. ....., 32 L. Ed. 2d 627, is but the last of the cases stretching back to *The Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 2d 83, on this proposition:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380, 18 L. Ed. 2d 830, 838, 87 S. Ct. 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

THE RIGHT OF FREEDOM OF ASSOCIATION—INCLUDING THE RIGHT TO ASSOCIATE WITH OTHERS AS STUDENTS IN A PRIVATE SECREGATED SCHOOL —IS A CONSTITUTIONALLY PROTECTED RIGHT

Every individual has the freedom to choose those with whom he or she will associate, and it matters not whether the purposes or beliefs sought to be advanced through such association pertain to political, economic, religious or cultural matters. It is a freedom guaranteed to all by the Constitution of the United States. And it includes the freedom to associate with others as students in a private segregated school.

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In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488, this court has this to say in derogation of Alabama's claim that it had the right to compel disclosure of the N.A.A.C.P. membership list:

> ". . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

In *Bates* v. *Little Rock*, 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480, this court set aside a conviction for violating a statute which required the disclosure of the N.A.A.C.P. membership list.

> ". . . And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States."

In *Shelton* v. *Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231, this court declared unconstitutional an Arkansas statute which compelled every teacher, as a condition for employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding 5 years.

> "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied

to freedom of speech and a right which, like free speech, lies at the foundation of a free society."

In *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 81 S. Ct. 1333, 6 L. Ed. 2d 301, this court had before it two statutes, one of which outlawed associations affiliated with an association of which an officer or director was a member of a subversive organization. Said the court:

> "We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment."

Griswold v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, involved a statute under which the executive and medical directors of the Planned Parenthood League of Connecticut were convicted on a charge of having given information, instruction and advice to married persons as to the means of preventing conception.

In invalidating the statute, the court said:

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."

The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the constitutionally protected right to belong to political groups embracing both legal and illegal aims so long as one does not intend to engage in acts in furtherance of their unlawful purposes. *Scales* v. *United*

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States, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782; *Elfbrandt* v. *Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321. "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405.

CONCLUSION

We submit that that part of the judgment of the United States Court of Appeals for the Fifth Circuit dated June 7, 1972, whereby the district court was directed to enjoin petitioner, its members, successors or assigns from using its property for a private segregated school should be reviewed by this Court.

And since our complaint against said judgment may seem inconsistent with the fact that petitioner operates its school under a nondiscriminatory code which provides that an applicant's race, color, religion or national origin will *not* be taken into account in the determination of whether an applicant will be accepted or rejected as a student, we beg leave to amplify our position thereasto.

First, we assure the Court that petitioner intends to continue the operation of its school on a nondiscriminatory basis. Petitioner has no intention of changing its policy in that regard.

But the fact that petitioner has no intention of changing its nondiscriminatory admissions policy is not a good reason for acquiescing in the denial of its constitutional rights. As a former Chief Judge of the Court of Appeals for the Fifth Circuit said in *McComb* v. *Hunsaker Trucking Contractor,* 171 F. 2d 523:

> "It is only where the citizen and the government come in conflict that the real value of constitutional rights appear. It is only because in the American way of life a free man is one who knows his rights and, knowing, dares maintain them that the American Constitution has been, and will continue to be, more than a scrap of paper and that constitutional government has been, and will continue to be, a reality here."

And there is another good reason why petitioner should insist on its constitutional rights. It grows out of the conviction that as long as it is subject to an injunction such as is sought to be imposed against it, it will continue to be harassed with frivolous and unfounded claims of discrimination. Should it refuse to accept a black student because of a vicious and immoral character, or because of an inability to do the work required of a student, or for any other justifiable nonracial reason, it will be charged with discrimination, regardless of the fact that the same standards are applied to white applicants. If it should fail a black student for poor school work, it will be charged with discrimination. Those who make a living ferreting out pretexts for such charges, and who come from afar with the avowed purpose of disrupting the domestic tranquility of our community, will busy themselves with such complaints.

Illustrative of the type of nondeserved condemnation petitioner seeks to avoid is the conclusion reached by the two judges of the Court of Appeals for the Fifth Circuit who originally equated the sale of the property with an attempt to circumvent the decision in *Wright* v. *City of Brighton*, despite the fact that the sale of the property was made fifteen months before *Wright* v. *City of Brighton* was heard of.

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A third reason why petitioner must protest the deprivation of its property rights is that it seems to be based on the view that private schools in Mississippi are evil. That notion must be questioned.

Why is the enrollment of Mississippi children in private schools viewed as symptoms of regional hysteria and sickly racist minds? Do not the parents of those children have the same right to provide their children with what they conceive to be an acceptable education as the members of the federal courts who send their children to private schools rather than public schools, or the famous Senators who do the same, or the very high federal officials, both black and white, who also do the same, particularly when the private schools to which they send their children are essentially segregated in the sense that they are overwhelmingly white? We submit that the motives of those Mississippians who choose to exercise the right vouchsafed to them by the Constitution to enroll their children in nonpublic schools should not be automatically misconstrued. They, too, have the right to provide their children with what they consider to be an acceptable education environment.

Again, we submit that the petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner hereby certifies that true copies of the foregoing petition have been served on counsel for respondents, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to Hon. Robert J. Kelly, 1515 Jefferson Avenue, Oxford, Mississippi 38655, and Hon. William Joyner, 108½ South Lamar Street, Oxford, Mississippi 38655.

Dated: September 1, 1972.

SEMMES LUCKETT
Counsel for Petitioner

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
No. EC 7029-S

KELLY McNEAL, ET AL.,
Plaintiffs

V.

TATE COUNTY SCHOOL DISTRICT, ET AL.,
Defendants

MEMORANDUM OPINION

This action presents a very vexatious problem in a school desegregation case, and one difficult of determination.

Plaintiffs filed the complaint in this action on April 27, 1970, seeking an order of the court requiring the Tate County School District (School District) to abandon its dual system of schools and convert to a unitary system, within which no person is to be effectively excluded from any school because of race or color. *Alexander* v. *Holmes*, 1969, 24 L ed 2d 19, 396 U S 19. Jurisdiction is predicated on 42 U.S.C. §§ 1981 and 1983, and 28 U.S.C. § 1343.

Originally the defendants were the School District Superintendent of Education and the members of the Board of Education of said county. Plaintiffs charged in the complaint, inter alia, that defendants sold and conveyed one of its school attendance centers to the Tate Educational Foundation, Inc. (Foundation) at a price far below its market value in order to encourage, foster and assist the Foundation in establishing and operating a private school so as to avoid the impact of the desegregation of the schools of the School District. Plaintiffs sought to

recover the property for the district, contending that the transaction violated the rights of plaintiffs and others similarly situated under both the Federal and State Constitutions.

The plaintiffs did not sue the Foundation or Harold Webster Steward (Steward) to whom the School District sold and conveyed the property, and, who, thereafter transferred the property to the Foundation.

The court permitted plaintiffs to amend the complaint so as to make Steward and the Foundation parties defendant to the action.

The action came on for hearing before the court at Clarksdale, Mississippi, on Wednesday, August 12, 1970, on the issue of the validity of the sale of the property and the right of plaintiffs to require the School District to recover the property for the benefit of the district. After hearing the evidence the case is now before the court for decision.

The court adopts the findings of fact and conclusions of law which follow as the holding of the court on the issues under consideration.

FINDINGS OF FACT

1. The School District encompasses all of Tate County, except that portion of the county situated within the Senatobia Municipal Separate School District.

2. The Thyatira School property, which is the subject of this controversy, consists of a seven-classroom school building with auditorium, constructed in 1941, duplex residence, formerly used as a teachers home, shop building and gymnasium. These structures are situated on a six acre tract of land.

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3. The School District was reconstituted under state law in 1956 or 1957. At that time the state law required the operation of a dual system of schools. In the reconstitution of the district the Thyatira School was reduced from a school serving grades 1-12 to one serving grades 1-6. The school building has a capacity of 250-300 students and its auditorium will seat approximately 200 students. The school served grades 1-6 through the scholastic year 1963-64 when it was reduced to a school serving grades 1-4. Since the 1964-65 school year the school has served only students attending grades 1-4, and only two of the seven classrooms in the building have been utilized. During this period of time two teachers have been assigned to the school. In only one year, during this period of time, has the number of students exceeded fifty. In the school year 1965-66 the number of students in attendance were fifty-one. For the school year 1969-70 there were thirty-five students in attendance, of which sixteen were white and nine were black students.

4. The School District has expended only a very meager amount of its funds to maintain and keep in good repair the school building, shop, gymnasium, and teachers home. As the result of improper maintenance since the 1963-64 school year all of the structures on the site have reached a dilapidated and run-down condition. To bring the structures into any reasonable state of good repair would require a large expenditure of funds for capital and extensive improvements.

5. The defendant School District in 1965 or 1966 adopted the "Freedom-of-Choice" plan for the operation of the schools within the district. This plan failed to remove the dual system of schools and did not convert the schools of the district into a unitary system. In late

August or early September 1969 members of the Board of the School District, and the Superintendent of Education, were made aware of the fact that the "Freedom-of-Choice" plan would not meet the guidelines of the Office of Education, Department of Health, Education and Welfare (HEW), and that the district must convert to a unitary system in order to receive government funds.

6. In the operation of the Thyatira School during the 1969-70 school year and previous years, since 1963-64, the School Board expended a much larger sum for the education of each student, than in other schools operated by the district, where the student bodies were larger. In July 1969, the School District was given notice that the per-pupil expenditures at its several schools would have a bearing on the district's right to continue to receive Title I funds.

7. The members of the Board of the School District and the Superintendent of the schools recognized that the continuation of the school was not economically or educationally feasible. The same situation as existed at the Thyatira School also existed at two other attendance centers of the district. The Arkabutla Attendance Center had only fifty-four students and the West Tate Attendance Center only seventy-eight students for the scholastic year 1969-70. At its regular meeting on November 3, 1969, the School Board adopted a resolution directing that the school attendance centers at Arkabutla, Thyatira and West Tate be closed, as of the end of the 1969-70 school year, and declaring its intention to treat each of the attendance centers as surplus property.

8. The School Board, at its regular meeting on December 10, 1969, adopted a resolution declaring that the Thyatira School property was not needed in the operation

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of the schools of the district, and directing the Secretary of the Board to advertise for bids for the sale of the property. Pursuant to the resolution, notice was given of the sale of the Thyatira School property for the time and in the manner as required by applicable Mississippi statutes.[1]

9. Realizing the impact of full and complete integration of the schools of the district and the adoption by the School Board of the unitary system of schools for the district, defendant Steward and approximately eighty other citizens of the county established a fund amounting to approximately $8,000.00 to be used in the establishment of a private school in the Thyatira community, and the acquisition of property for that purpose. Steward was delegated by the group as its agent to bid on the Thyatira School property. Steward submitted a bid to the School Board, at its January 1970 meeting. The bid submitted, in all respects, met with the requirements of law. The Steward bid was for the sum of $4001.00. The School Board received no other bids, and Steward's bid was accepted and the property conveyed to him by quitclaim deed on January 7, 1970. The School District retained possession of the property until June 1, 1970. Thereafter, on January 26, 1970, Steward conveyed the property to the Foundation, a domestic non-profit Mississippi corporation which had been organized and chartered in the interim. The Foundation did not pay Steward any money for the deed, as the consideration for the property paid by Steward to the School District came from the above mentioned fund.

10. After the delivery of the deed to the Foundation, and in early February 1970 the School Board per-

1. Sections 6328-41, 6328-42, and 6328-43, Mississippi Code 1942, Annotated, Recompiled.

mitted the Foundation to enter the property and begin repairs to the structures situated thereon. The Foundation expended approximately $20,000.00 for materials and labor going into the repair of the buildings and an unestimated amount of free labor has been donated by interested parties.

11. The School Board and its Superintendent, at all times pertinent hereto, were aware of the fact that a movement was on foot in the county by many of its white citizens to start private schools, in order to avoid the impact of the integration of the public schools of the district.

12. There was no pre-arrangement or prior understanding between the Foundation, any of its members, or Steward with members of the School Board or its Superintendent that the Thyatira School property would be declared surplus property, and its sale ordered, so as to enable the Foundation or group of citizens interested therein to obtain the property at an inadequate price to be utilized as a private school by the Foundation or others interested in establishing such a school.

13. The Thyatira School is situated in a rural neighborhood of the county, and is not suitable for commercial use. The six acre tract upon which the school buildings are situated, is located on a public road, but the evidence does not reflect what portion or portions of the tract can be used for residential purposes. The buildings, with the exception of the teachers home, are not suitable for any use, except for school purposes. The condition of the teachers home was such at the time of the sale, that it did not add any value to that of the land upon which it is situated. The school building, shop and gymnasium were in such ill repair, that they added lit-

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tle value, if any, to the value of the land comprising the school site. Such structures did not add any value to the land, except to a purchaser intending to use the property in the operation of a school. In the latter instance the purchaser would realize some value from the improvements because such could be renovated and repaired and used in the operation of the school. Considering the totality of the circumstances as shown by the evidence, the court holds that plaintiffs have not shown by a preponderance of the evidence that the School Board sold the Thyatira School property for such a grossly inadequate price that the sale amounted to a donation of property of the district, directly or indirectly, to Steward, or the Foundation.

14. The Foundation has opened its school to members of all races. The faculty and staff selected to operate the school are all members of the white race, as are all members and directors of the Foundation. All students accepted by the school are white students. No black student has applied for entrance. The financial requirements for attendance of students is such as to prevent the enrollment of most of the black children of the county.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter. The court has the power and duty to enter such judgment as equity requires. *Porter* v. *Warner Holding Co.*, 1946, 328 U S 395, 398, 90 L ed 1332, 1336-7; *Alexander* v. *Hillman*, 1935, 296 U S 222, 242, 80 L ed 192, 201.

2. The Thyatira School has outlived its usefulness as a school and is not needed in the operation of the schools of the district. In such a situation the School

Board is authorized by law to abandon the property and sell the same, as surplus property. Section 6328-41, Mississippi Code, 1942, Annotated, Recompiled.

3. The sale of the Thyatira School property by the School Board was consummated in every respect as required by the statutes of the State of Mississippi. The sale was advertised by the Board for the time and in the manner required by law. Section 6328-42, 6328-43, Mississippi Code 1942, Annotated, Recompiled.

4. The School Board cannot legally donate property, directly or indirectly, to private corporations or individuals for any private purpose. Art. 4 § 9 Constitution of the State of Mississippi of 1890; *Koonce* v. *Board of Supervisors of Grenada County* (Miss.) 32 So.2d 264, 265.

5. The School Board is required by law to act in good faith, and cannot sell or convey surplus property for a grossly inadequate consideration. *State* v. *Adams* (Miss.) 1939, 188 So. 551, 553.

6. The defendant Steward and his vendee, Tate Educational Foundation, Inc., for whom he acted as agent, are not innocent purchasers for value of the Thyatira School property, if the price paid for the property is so grossly inadequate as to virtually amount to a donation. *State* v. *Dear* (Miss.) 55 So.2d 370, 374.

7. The presumption exists that the members of the School Board discharged their duty in regard to the abandonment and sale of the Thyatira School property in accordance with law, exercising honest judgment in that regard. This presumption will be given effect in the absence of clear evidence to the contrary. *Hawkins* v. *Town of Shaw, Mississippi,* 303 F. Supp. 1162; *M. T. Reed Construction Co.* v. *Jackson Municipal Airport,* 227 So.2d 466.

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8. The burden rests upon one who seeks to set aside a public sale to show that the price is so grossly inadequate as to indicate fraud or lack of good faith on the part of one making the sale. This rule prevails in cases of foreclosure sales under mortgages or deeds of trust. *Smith* v. *General Investments, Inc.* (Miss.) 1963, 150 So.2d 862.

SUMMARY

The issue presented to the court must be decided on the basis of the facts shown by the record in this case. Every action in this field of the law must rest on its own bottom, and seldom are there two cases on all fours with each other. For that reason the decision of the court as hereinafter set forth must be and is expressly limited to the issues presented by the record herein.

The evidence is clear that the Thyatira School has not been needed in the operation of schools in the School District since the reconstitution of the district more than fifteen years ago. When the school was reduced from a school serving grades 1-12, to a school serving grades 1-6, its demise became apparent, and when reduced to a school serving grades 1-4, the demise became a reality, but the burial was delayed more than five years, to the detriment of the School District economically and educationally.

It is, therefore, the opinion of the court that the School Board was fully warranted in abandoning the school and classifying the property as surplus. That such action might have been triggered by the realization that the dual system of schools, which had continued under the "Freedom-of-Choice" plan, must be discarded in favor of a unitary system to be accomplished by the pairing of schools or grades is of no moment. The fact

remains, that, regardless of this, sound judgment on the part of the Board, required the discontinuance of a school at Thyatira.

Having reached the proper decision to close the Thyatira School, it necessarily follows that the Board was under the legal duty to declare the property to be surplus property, and provide for its sale according to law.

The Board's duty was to obtain the best price possible for the property. The public was invited to bid on the property, and the invitation was extended with the publicity and in the manner required by law. The Board was obligated to accept the bid offered by defendant Steward for the property, unless the price offered was so grossly inadequate that the acceptance thereof amounted to a donation of private property for private use.

In the court's opinion, although the prospective purchaser intended to devote the property to use as a school or educational center, the amount bid for the property was adequate and sufficient in law to sustain the sale.

The property was purchased by a group who intended to establish and operate a private school, utilizing the property for such purpose. If there had existed a competitive market for the property for school usage, the bidding would have been more spirited and the property would probably have brought a substantially larger price. However, such a competitive market did not exist, and the court does not feel that cancellation of the sale will benefit the School District. Should the property be recovered for the district, having no use therefor, the Board would be burdened with the property until some disposition of the same could be made. The court cannot say with assurance that a resale of the property would be beneficial to the distrcit.

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The Foundation and the citizens of the county, interested therein, have the legal right to operate a private school, if they choose to do so. The court knows of no law that prevents such an enterprise, or which makes it illegal. It may be that the private school will draw a substantial number of pupils from the district schools, but this fact alone will not justify the court in setting aside the sale of the property to Steward, who made the purchase for the Foundation long before the institution of the action sub judice. In this connection the court must take note of the fact that the Foundation has invested substantial funds in the repair of the property since its acquisition. A large part of the expenditures occurred before the defendant Steward and the Foundation were added as parties defendant to the action.

It must be called to the attention of the parties that this action does not involve a sale of school property by a school board, after an integration action has been filed, nor does it involve an action where a school board has abandoned and sold school property based primarily upon a finding that the integration of the schools of the district will result in reduced attendance to the extent that the property will not be needed in the operation of the schools. Such situations must be dealt with in each individual case. Suffice to say such a situation does not exist in this action.

The court notes that the Arkabutla School property has been sold by the district, but no issue as to the validity of that sale is before the court. If such an issue should arise, the issue must be considered by the court on its own merits.

The court also notes that West Tate Attendance Center has been closed by the Board. In the exercise of the equity powers vested in the court in the action sub judice the court finds that the defendant Board should be en-

joined from disposing of said property, or any other real property of the district, or personal property having a reasonable value of $500.00 or over, without the prior consent of the court.

An order will be entered herein dismissing on its merits plaintiffs demand that the Thyatira School property be recovered for the district, and discharging from the action defendants Steward and the Foundation.

An order will also be entered enjoining the defendant School Board from abandoning and disposing of any of its property, to the extent hereinbefore noted, without prior consent of the court.

Dated August 19, 1970.

/s/ Orma R. Smith
Orma R. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
No. EC 7029-S

KELLY McNEAL, ET AL,
Plaintiffs

V.

TATE COUNTY SCHOOL DISTRICT, ET AL,
Defendants

ORDER

Pursuant to the opinion this day released herein, it is ORDERED:

1. That plaintiffs' demand that the court rescind the sale of the Thyatira School property by the defendant

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School Board to defendant Steward, and recover the same for the benefit of defendant School District from defendant Tate Educational Foundation, Inc., shall be and the same hereby is denied, and dismissed on the merits;

2. That the defendants Steward and Tate Educational Foundation, Inc., shall be and they hereby are dismissed as parties defendant to this action;

3. That the costs relative to the issue above noted is taxed against plaintiffs;

4. That a copy of this order shall be served by United States Mail on counsel for all parties, which service shall constitute notice to all parties to the action.

Entered this August 19, 1970.

/s/ Orma R. Smith
Orma R. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
No. EC 7029-S

KELLY McNEAL, ET AL,
Plaintiffs

V.

TATE COUNTY SCHOOL DISTRICT, ET AL,
Defendants,

ORDER

Pursuant to the opinion this day released herein, it is ORDERED:

1. That the court's order rendered herein on August 4, 1970, shall be and the same hereby is amended as follows:

By adding under that portion of said order dealing with and describing the plan for school operation by defendant School District, Section III thereof, entitled "School Construction and Site Selection", an additional paragraph as follows:

> The School District and the members of the Board of Trustees thereof, shall not sell or otherwise dispose of the West Tate Attendance Center, or any other real property owned by the district, or any of the district's personal property having a reasonable value of $500.00 or over, without the prior consent of the court, and, then, only upon the presentation of facts justifying that such be done.

2. That except as changed by this order the court's former order of August 4, 1970 shall be and remains in full force and effect; and

3. That a copy of this order shall be served by United States Mail upon counsel for all of the parties herein except counsel for defendants Steward and Tate Educational Foundation, Inc.; upon accomplishment of which all such defendants shall be deemed to have received notice of the entry hereof.

Dated August 19, 1970.

/s/ Orma R. Smith
Orma R. Smith
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30722

KELLY McNEAL, ET AL.,
Plaintiffs-Appellants,

versus

TATE COUNTY SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

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(September 17, 1971)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This is an action to set aside the sale of public school property to an all-white private school. The district court upheld the sale. We reverse.

Plaintiffs-appellants are black citizens of Tate County, Mississippi. They filed suit under 42 U.S.C. §§ 1981, 1983, and 28 U.S.C. § 1343, seeking equitable relief against the sellers of the property, the Tate County Board of Education and the Tate County Superintendent of Education, and by later amendment against the purchaser of the property, Harold W. Steward, acting as agent for a group of citizens who later formed the Tate County Foundation. The theory of appellants' complaint was that the Board

of Education encouraged and fostered racially segregated education by selling the Thyatira School to the Tate County Foundation which converted the school into a private academy attended exclusively by white children. After hearing testimony from both sides, the district court refused to invalidate the sale mainly on the grounds that there was no showing of illegality or bad faith by the school board in disposing of the property.

The facts surrounding the sale are substantially undisputed. Thyatira School consisted of four buildings located on a rural six-acre tract in the eastern half of Tate County, Mississippi. Constructed in 1941, the buildings deteriorated to such an extent that, by the Fall of 1969, they were in a dilapidated condition. During the 1969-1970 school year 35 children of both races attended Thyatira and utilized only three of its seven classrooms.

Realizing that the school had outlived its usefulness and that continued operation would be uneconomical, the Tate County Board of Education met on December 10, 1969, and voted to sell Thyatira School. Pursuant to this resolution, the property was advertised for three consecutive weeks in a weekly newspaper having a general circulation in Tate County as required by Section 6328-43 of the Mississippi Code of 1942, Recompiled.

The only offer submitted for the property was a sealed bid of $4,001.00 from Harold W. Steward, acting as agent for the Tate County Foundation (hereinafter, Foundation). The Foundation was comprised of approximately 80 citizens of the county who contributed $100.00 each to be used to acquire proprety for the establishment of a private school. At this point it is significant to note that the district court found, and we agree, that the Foundation sought to establish a private school in order to avoid

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"the impact of full and complete integration of the schools of the district" which came about as a result of the adoption of a unitary school plan by the school board.

The school board accepted Steward's bid and executed a quitclaim deed on January 7, 1970.

Although the Foundation did not receive actual possession until June 1, 1970, the school board allowed workmen to enter and begin renovating the buildings in February of 1970. While the repair work was in progress, the Foundation assembled an all-white faculty and staff and accepted applications from 134 white students. No black student applied for admission, undoubtedly because the annual tuition of $450.00 per child[1] was beyond the means of most of the black families in Tate County.

In June 1970 the newly formed private school was well on its way toward commencing operations under the name of Hillcrest Academy. However, when appellants filed suit to compel the school board to reacquire the property, the Foundation responded on July 28th with a nondiscriminatory admissions policy which declared that race would not be a factor in admitting students and that applicants would be judged solely on the basis of "moral character", "disciplinary record", and "educational background".

We are thus confronted with the sale of an old and deteriorated public school facility to a private academy which, regardless of its published admissions policy, is segregated as to faculty, staff, and student body. It is not contended that the school board lacked valid reasons for selling Thyatira School, or accepted an inadequate price

1. A family with four or more school age children would be subject to the following yearly tuition schedule: $450.00 for the first child enrolled; $450.00 for the second child, $300.00 for the third child; and no tuition for all other children in the family.

for the property, or in any way affirmatively participated in the creation of an all-white private school. However, the record fully supports the district court's finding that the school board was at all pertinent times aware of the "fact that a movement was on foot in the country by many of the white citizens to start private schools, in order to avoid the impact of integration of the public schools of the district".

With slight variations the identical issue was before this court in *Wright* v. *City of Brighton, Alabama,* 5 Cir., 1971, 441 F. 2d 447, where we held that the Fourteenth Amendment was violated by the city's sale[2] of a public school building to a private academy which the city knew had a policy of racial discrimination.

> "Here it is perfectly clear that the City of Brighton's determination to sell a public school building to an institution which the city knew would operate an all-white segregated school had the ultimate effect of placing a special burden on the black citizens of that community. The city in effect encouraged the maintenance of a segregated facility by its action. It participated in a transaction by which a public building, once open to all on an equal basis, was converted into a segregated facility where the black people of the community were no longer welcome. Whether we call such action the creation of a badge of slavery, *Jones* v. *Mayer,* 1968, 392 U.S. 409, 439, 88 S.Ct. 2186, 20 L.Ed. 2d 1189, a relic of slavery, *Jones* v. *Mayer,* supra, at 443, or a badge of inequality, *Palmer* v.

2. The state action necessary to a Fourteenth Amendment contention is the sale of the property by a governmental body:

"* * * Thus, it is the sale alone, not the city's involvement in the operation of the academy, which is in question here, and it is clear beyond peradventure that the sale itself was state action. * * *"

441 F. 2d at 450.

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Thompson, 5 Cir., 1969, 419 F. 2d 1222, *cert. granted*, ... U.S. .....,[3] such a segregated institution is one of the many humiliations which society has visited upon the black man. The Supreme Court and others have taken occasion to note the feelings of inferiority generated in the "hearts and minds of Negro children when they are separated solely because of race from those of similar age and qualification." *Brown* v. *Board of Education of Topeka*, 1954, 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873; *Dawson* v. *Mayor and City Council of Baltimore City*, 4 Cir. 1955, 220 F. 2d 386, 387, aff'd. 350 U.S. 877. The effect of the city's action here was to create another place where these feelings of inferiority could be generated, and it was all the more a humiliating indignity because this building had for years been a public school building which did not lose its identity as a public facility just because legal title changed hands."

441 F. 2d at 451.

Of course, the City of Brighton had actual knowledge that the school building it sold would be operated as an all-white segregated academy, and here, the members of the Tate County Board of Education gave unrefuted testimony that they were not aware that the Thyatira School was being sold to purchasers who intended to create a private school. But this distinction becomes inconsequential in view of testimony from board members who stated that, even though they were cognizant of local and statewide movements to avoid desegregation by forming private schools, no effort was made to discuss, to investigate, or even consider the patently obvious possibility that Thyatira might become a segregated academy after it was sold. (R. 154, 209)

3. This court's decision was affirmed by the Supreme Court in *Palmer* v. *Thompson*, 1971, ... U.S. ....., 39 U.S.L.W. 4759.

We will not allow a school board to circumvent our decision in *Wright* v. *City of Brighton, Alabama,* supra, by ignoring local conditions and then claiming that it did not know that public property was being sold to those who would practice racial discrimination. As Judges Wisdom[4] and Goldberg[5] of this court have observed, federal judges are not so naive in the field of civil rights.

Furthermore, school boards are charged with the *affirmative* duty to take whatever steps might be necessary to bring about a unitary educational system which is free from racial discrimination. *Green* v. *School Board of New Kent County,* 1968, 391 U.S. 430. That duty includes making some sort of reasonable investigation of prospective purchasers when school property is sold in an area where it is common practice to establish all-white private schools as a response to court-ordered integration. In the case at hand, the members of the Tate County Board of Education knew full well of efforts to thwart integration by setting up private academies, and yet, they made not the slightest effort to determine what use the purchasers would make of Thyatira School. By their inaction the board members breached their affirmative constitutional duty to achieve a unitary school system and provided aid to a scheme which resulted in more—not less—segregation.

We need not state in detail exactly what type of inquiry must be made of prospective purchasers by sellers of public school property for that question is not before us. In any event, the standard would most likely vary with the facts of each particular case. Suffice it to say that in this case the Tate County Board of Education

4. *United States* v. *City of Jackson, Mississippi,* 5 Cir., 1963, 318 F. 2d 1, 5.

5. *Wright* v. *City of Brighton, Alabama,* 5 Cir., 1971, 441 F. 2d 447, 453.

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closed its eyes and made no inquiry whatever, and for that reason the sale of Thyatira School must be set aside.

That part of the district court's order upholding the sale of Thyatira School is therefore reversed and the case remanded with directions that the court enter an order invalidating the sale and reconveying the property to the Tate County Board of Education.

Finally, the district court enjoined the sale of any additional school property in Tate County without prior approval by the court. We affirm this part of the court's order with the stipulation, of course, that all future sales be approved only upon compliance with the views expressed herein.

REVERSED IN PART; AFFIRMED IN PART; REMANDED WITH DIRECTIONS.

GEWIN, Circuit Judge, Dissenting:

Although nothing said in this dissent is intended to reflect unfavorably upon the sincerity and dedication of my brothers of the majority, nothing they have said in their opinion (the opinion) convinces me that the conclusion reached in this case is correct.

Without finding that the trial court, sitting as a court of equity without a jury, made even one clearly erroneous finding of fact, almost totally ignoring the facts found, and relying on an unwarranted, illogical, unjust and unreasonable extrapolation of a case[1] not cited by any party to this litigation, the majority has reversed the judgment of the district court on the only issue presented for review. In addition, a totally different judgment has been rendered on the appellate level. It is indeed regrettable that such

1. Wright v. City of Brighton, Alabama, 441 F.2d 447 (5th Cir. 1971).

a decision should be imposed upon an outstanding district judge who is well known for his courage and expertise in the area of law here involved; not to mention an innocent Board of Education in a small rural school system.

From the statement of the issue to be decided to the final conclusion reached, the flavor and implications of the opinion are totally contrary to all of the facts found by the trial court, as the opinion silently concedes. Essentially the opinion concludes that

> [T]he district court refused to invalidate the sale mainly on the grounds that there was no showing of illegality or bad faith by the school board in disposing of the property.

Actually the district court did find that the School Board acted in *good faith and lawfully* in every respect, and that the consideration paid for the property was not inadequate. Quite to the contrary of the implications of the opinion, the court found and concluded as follows:

> It must be called to the attention of the parties that this action does not involve a sale of school property by a school board, *after an integration action* has been filed, nor does it involve an action where a school board has abandoned and sold school property based primarily *upon a finding that the integration of the schools* of the district will result in reduced attendance to the extent that the property will not be needed in the operation of the schools. Such situations must be dealt with in each individual case. Suffice to say such a situation does not exist in this action. (Emphasis added)

The district court further found the following additional and important facts, totally ignored in the opinion:

a. The evidence is clear that the Thyatira School has not been needed in the operation of schools in the School District since the reconstitution of the district *more than fifteen years ago.* (Emphasis added)

b. Having reached the *proper decision* to close the Thyatira School, it necessarily follows that the Board was under the legal duty to declare the property to be surplus property, and provide for its sale according to law. (Emphasis added)

Pertinent Facts Found By The District Court

The district court found from ample, substantial and undisputed evidence in the record that since 1963-64 the school board had expended a much larger sum for the education of each student at the school here involved than had been spent in other schools operated by the district. In July 1969, the school board was given notice by proper officials that the per pupil expenditures at the school would have a bearing on the right of the district to continue to receive federal funds under the Title I program. For a period of seven years the number of students attending the school did not exceed 50 except for one year when 53 students attended. At the time of closing there were two teachers and only thirty-five students in attendance, approximately 25% of which were black.

The court specifically found that the continued operation of the school was not economically or educationally feasible, that such condition had not come about as a result of integration, but that the closing was based on sound educational considerations. The court found and the proof conclusively demonstrated that the 6 acre tract

of land, located in a rural section, had no commercial value and that the buildings located thereon "added little value, if any, to the value of the land comprising the school site."

With this factual background and without any apparent secrecy whatever, at a regular meeting on November 3, 1969 the school board adopted a resolution directing that the school in question be closed at the end of the 1969-70 school year and declaring its intention to treat the school site as surplus property. At its regular meeting on December 10, 1969 the school board adopted a resolution declaring that the property here involved was not needed in the operation of the schools in the district, and directed the secretary of the board to advertise for bids for the sale of the property.

Pursuant to these resolutions the tract of land was advertised according to law and was sold to Steward, in accordance with his bid, on January 7, 1970. At that time the Tate County Foundation, Inc. was not in existence. During this entire period of time neither the plaintiffs nor anyone else objected to the sale, they offered no bids and did not contest the decision of the school board to declare the property not needed and surplus pursuant to the requirement of the Title I program.

Moreover, when this suit was first filed neither Steward nor his subsequent grantee (the Foundation) were made parties. This omission was raised in the answer of the school board and it was not until June 8, 1970 that the plaintiffs amended their complaint in order to join Steward and his grantee. In the meantime, as the district court specifically found, the Foundation had expended approximately $20,000 on the property in addition to the

purchase price and substantial free labor which was donated by those interested in the Foundation.[2]

Although not specifically referred to by the district court, the record conclusively shows that at the time of trial only 134 pupils had sought enrollment in the Foundation school. A number of the students did not even come from the Tate County School District but came from other districts. The total number to be enrolled in the Foundation school (including those who came from outside the district) was only about 3% of the total enrollment of the entire district which serves approximately 4,000 students.

Conclusion

Stretching beyond reason the holding in *Wright*, the opinion now imposes upon school boards the duty to investigate how prospective purchasers and their grantees propose to use property which is sold in accordance with law, but declines to say what type of investigation should be made. The following language is used in the opinion: "We need not state in detail exactly what type of inquiry must be made of prospective purchasers . . ." To place such a burden on members of a board of education, who usually serve out of a sense of civic duty, in a small Mississippi rural school district is incomprehensible to me. The majority seems to conclude that the title to lands once used for schools may be forever tainted, and that somehow, there is raised by implication of law a covenant that will run with the land prohibiting its use for any type of private school endeavor.

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2. The court found:

In this connection the court must take note of the fact that the Foundation has invested substantial funds in the repair of the property since its acquisition. A large part of the expenditures occurred before the defendant Steward and the Foundation were added as parties defendant to the action.

For the foregoing reasons I am unable to generate any taste whatever for the judgment set forth in the opinion in this case. It is difficult for me to believe that this court is possessed of so much goodness and wisdom that it can, in the circumstances and under the facts here presented, declare the judgment of a careful district judge null and void. There are simply too many impediments—legal, factual and equitable—involved in this case to permit my concurrence.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30722

D. C. Docket No. DC 7029-S

KELLY McNEAL, ET AL.,
Plaintiffs-Appellants,

versus

TATE COUNTY SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

JUDGMENT

(Filed June 19, 1972)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

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ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part and affirmed in part; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

GEWIN, Circuit Judge, Dissenting: September 17, 1971

Issued as Mandate: June 16, 1972.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30-722

KELLY McNEAL, et al.,
Plaintiffs-Appellants,

versus

TATE COUNTY SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC
(Opinion September 17, 1971, 5 Cir., 1971 ..... F.2d .....).

(June 7, 1972)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM: Upon consideration of the petition for rehearing filed by the appellees, we modify that portion of the majority opinion which reversed the order of the district court upholding the sale of Thyatira School and remanding the case with directions that the district court enter an order invalidating the sale and directing reconveyance of the property to the Tate County Board of Education. We now vacate the order of the district court upholding the sale of Thyatira School, and remand the case to the district court with directions to enter an order up-

holding the sale of the school but enjoining the Tate County Foundation or its members, successors or assigns from using the property for the operation of a private school on a discriminatory basis. Such injunction of the district court shall provide that if the Thyatira School property is used for a private school, such school shall be operated without any discrimination of any kind or character based upon race, creed, color or national origin, and the doors of any such school shall be open at all times to all qualified applicants on an equal basis.

It appears to be appropriate to express a caveat to courts who in the future may have to consider the sale of public school property for use as a private school. Such a sale should be scrutinized with the utmost care and caution to the end that public school property shall not be converted to use by private schools which engage in forbidden discriminatory practices. We adhere to the principles announced in *Wright* v. *City of Brighton, Alabama,* 5 Cir. 1971, 441 F. 2d 447.

Except for the modifications herein ordered, the petitions for rehearing are hereby DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the petitions for rehearing en banc are also DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

No. DC 7029-S

KELLY McNEAL, ET AL,
Plaintiffs

v.

TATE COUNTY SCHOOL DISTRICT, ET AL,
Defendants

ORDER WITH INJUNCTION

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit issued on appeal in this action and received by the Clerk of this Court on the 19th day of June, 1972, it is

ORDERED AND ADJUDGED:

I. That the order entered herein on August 19, 1970, upholding the sale of the Thyatira School property in Tate County, Mississippi, shall be, and the same hereby is, vacated;

II. That the sale of the school property aforesaid by the defendant School District to defendant, Harold Webster Steward, shall be, and the same hereby is, approved, subject, however, in all respects, to the injunctive features of this order which follow;

III. That the Tate Educational Foundation, Inc., a Mississippi corporation, the ultimate purchaser and present owner of the said property, each and every member of its Board of Directors; each and every individual holding stock or membership in said corporation, their agents, employees, successors or assigns, and all those in active

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concert and participation with them, shall be, and hereby are, permanently enjoined and restrained from using the said Thyatira School property or any portion thereof for the operation of a private school on a discriminatory basis;

IV. That, in the use of said property or any portion thereof as a private school, the parties mentioned in Paragraph III above, are mandatorily permanently enjoined

a) to operate the said private school without discrimination of any kind or character based upon race, creed, color or national origin, and

b) to keep the doors of the school open at all times to all qualified applicants on an equal basis.

V. That the costs of this action, relative to the issue involving the sale of the Thyatira School property, shall be, and the same hereby are, taxed against the defendants.

This the 20th day of June, 1972.

/s/ Orma R. Smith
Orma R. Smith
United States District Judge

THE STATUTES INVOLVED

This case involves *Sections 6328-41, 6328-42,* and *6328-43* of *Mississippi Code of 1942 Annotated,* which can be found in *Volume 5* of *1971 Cumulative Supplement to Mississippi Code 1942 Annotated,* at pages 583 and 584:

"#6328-41. Sale of property not used for school purposes.

"When any school district, including municipal separate school districts with or without added territory, or any agricultural high school or junior college shall own any land, buildings or other property that

is not used for school or related school purposes and not needed in the operation of the schools of the district, the board of trustees of such school district or agricultural high school or junior college may sell and convey such land, buildings or other property in the manner provided in this act. For the purposes of this act any consolidated school district, line consolidated school district, county-wide school district or municipal separate school district shall be considered the owner of any property heretofore conveyed for local school purposes to the state board of education, created under the terms of article III, chapter 39, Mississippi Code of 1871, where title to said lands remains in said board of education, and such property lies within any consolidated school district, line consolidated school district, county-wide school district or municipal separate school district.

"#6328-42. Resolution required for sale.—When the board of trustees of any such school district, agricultural high school, or junior college shall desire to sell any such property it shall pass a resolution declaring that such property is not needed nor used for school purposes and shall direct, in such resolution, that same be advertised for sale upon competitive bids in the manner hereinafter provided.

"6328-43. Publication—sealed bids.—All such land, buildings or other property shall be sold only after the receipt of sealed bids therefor after the time and place of making such sale shall have been duly advertised in some newspaper having a general circulation in the county in which the property is located once each week for three (3) consecutive weeks with the first publication to be made not less than fifteen (15) days prior to the date upon which such bids are to be received and opened. The property shall be sold

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to the highest and best bidder for cash, but the board of trustees shall have the right to reject any and all bids. If the property be not sold pursuant to such advertisement, the board of trustees may, by resolution, set a date for an open meeting of said board of trustees to be held within sixty (60) days after the date upon which the bids were opened. At the meeting held pursuant to such resolution the board of trustees may sell by auction the said property for a consideration not less than the highest sealed bid previously received pursuant to said advertisement. At the meeting called pursuant to said resolution any interested party may bid for cash and the property shall be sold to the highest and best bidder for cash, but the board of trustees shall have the right to reject any and all bids. The board of trustees may require a written confirmation of bids received at such called meeting before selling the property at auction, but it shall not be necessary that sealed bids be received before conducting the auction. When the sale of such property shall be authorized and approved by the board of trustees the president of the board of trustees shall be authorized and empowered to execute a conveyance of said property upon the terms and for the consideration fixed by the board. Provided, however, that said board of trustees shall reserve unto said district at least an undivided one-half (1/2) nonparticipating royalty interest in all oil, gas and minerals in, on or under said land, and all proceeds derived from royalties upon said reserved mineral interests shall be used as provided by section 4 (#6328-44) of this act; and if the mineral interests of the district shall be less than the full and undivided ownership, the undivided royalty interest reserved by said district shall be reduced proportionately."